SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1970

No. 825

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

against

HONORABLE IRVING BEN COOPER, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Petitioner, the People of the State of New York, by its attorney, the District Attorney of New York County, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 24, 1970.

Opinion Below

The Court of Appeals rendered no opinion. The opinion rendered by the District Court for the Southern District of New York appears in the appendix to the sealed petition for a writ of mandamus to the Court of Appeals for the Second Circuit, transmitted to this Court.

Jurisdiction

The order of the Court of Appeals for the Second Circuit was entered on September 24, 1970, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

Question Presented

Did the District Court exceed its jurisdiction in refusing to remand the state prosecutions to the state Court?

Statutory Provisions Involved

United States Code, Title 28:

§1442. *Federal Officers Sued Or Prosecuted*

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending.

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under

color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

§1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Statement of the Case

On April 14, 1967 Herbert Itkin was indicted by a New York County grand jury on eleven counts of grand and petit larceny from Bernard W. Robbins and the Robbins Investment Co., Inc. occurring between September 24, 1964, and January 21, 1965 (1-11,* Indictment No. 1569-67). He was charged with having defrauded the victims of $15,000, by criminally converting escrow funds given Itkin against the obtaining of a mortgage from a Teamster pension fund.

Fourteen months later, he was indicted in New York County for the crime of conspiring in December, 1967 to commit perjury before a New York County grand jury (12-20, Indictment No. 2842-68, filed June 21, 1968). It was charged that he had schemed with one Charles Rappaport

* Copies of all of the affidavits and other documents submitted to Judge Cooper on the petition for removal and the motion for remand, and Judge Cooper's decision and opinion, together with copies of the three state indictments and the minutes of two state proceedings concerning them are included in the appendix to the sealed petition filed in the United States Court of Appeals for the Second Circuit and transmitted to this Court by the Clerk of that Court. Unless otherwise indicated, the numbers in parentheses refer to pages of that appendix, numbered at the top.

and James L. Marcus, former Commissioner of the Department of Water Supply, Gas and Electricity of the City of New York, that Marcus would falsely swear and testify before a New York County grand jury concerning the source of funds credited to his account with Koenig & Co., a finance firm. The indictment alleged that in 1966 Marcus purchased 2,000 shares of the stock of Xtra, Inc., on margin, for about $202,000, substantially financed by Koenig & Co.; that the price of the stock plummeted and Koenig demanded more collateral; that while Marcus was Water Commissioner, cash credits of $52,000 were made to Marcus's account at Koenig; and that the grand jury was investigating to determine whether Marcus and others had committed bribery. The indictment charged that Itkin, Marcus and Rappaport, in contemplation of Marcus's appearance before the grand jury and inquiries as to the source of the cash deposits in his Koenig account, conspired to have Marcus falsely testify that he did not know Antonio Corallo and that neither Corallo nor Daniel Motto was the source of any of the $52,000 cash.

Itkin was further indicted in ten counts for the crimes of bribery, conspiracy to take unlawful fees, taking unlawful fees, and bribe receiving, committed between June 1, 1966, and October 31, 1967 (21-39, Indictment No. 2843-68, filed June 20, 1968). Herbert Itkin, the grand jury charged, had conspired with Marcus and others that Marcus, in his capacity as a public officer, would award emergency contracts from the Department of Water Supply, Gas and Electricity to certain companies, including Edward Orlando's contracting company, for kickbacks. Marcus and Itkin would share equally all of these bribes. Bribes were actually received.

The People were ready to try these indictments in the state court and Itkin's defense counsel said that he too was ready for trial (41-3, 46-7, 126-31).

On October 4, 1968, the defendant removed the three criminal prosecutions on these indictments from the Supreme Court, New York County, to the United States District Court, Southern District of New York, invoking 28 U.S.C. 1442(a)(1), submitting a petition (62-7) signed and verified by Philip J. Ryan, Esq., then attorney for the defendant. The petition stated that during the periods specified in the indictments, the defendant was an "informer" for the Federal Bureau of Investigation, was "performing duties incidental to his mission of penetrating organized crime" and performed acts "in connection with the matters" covered by the three indictments under color of his office and in performance of his duties.

On October 29, 1968, the People moved the District Court, Honorable Irving Ben Cooper, District Judge, to remand the three prosecutions (70-77). Prior to the motion but after the notice of motion had been given, the defendant himself submitted an affidavit (80-91) stating that he had performed information-gathering missions for the Central Intelligence Agency during the time specified in the state indictments and had worked extensively with officials of the FBI as an "informer." He also referred to the three indictments and alleged functions that he pursued for the FBI in connection with federal prosecutions in which he was to be a principal witness.

In the affidavit (73-7) filed in support of the motion for remand, the People, by Frank Rogers, Esq., an Assistant

District Attorney of New York County, referred to testimony of Itkin at the trial in the District Court of the case of *United States* v. *Antonio Corallo, Henry Fried, Herbert Itkin, James L. Marcus, Daniel J. Motto, Charles J. Rappaport, et al.* (67 Crim. 1051). This prosecution involved a corrupt scheme to obtain from Marcus's Department of Water Supply, Gas and Electricity an emergency contract for cleaning the Jerome Park Reservoir in New York City. The Government's evidence showed that Marcus owed Koenig & Co. substantial sums for losses on 2,000 shares of the stock of Xtra, and that Itkin arranged with Motto and Corallo to help Marcus cover his losses with cash in return for a public contract to Fried's company, some of the money being credited to Marcus's account with Koenig & Co. Fried also gave Itkin money for a contract to Edward Orlando, another contractor in which Fried was a silent partner. After the New York County District Attorney's investigators began to inquire, Marcus falsely testified before the New York County grand jury that he did not know Corallo. The theory of the government's case was that Itkin and the other defendants had violated 18 U.S.C. §1952 by using a facility in interstate commerce with intent to promote bribery in violation of the laws of New York State [former New York Penal Law §§372, 378], the same laws involved in the third state indictment. The government stated that Itkin acted as a co-conspirator with criminal intent, not as an agent or informer for the FBI. At the trial in the District Court, Mr. Rogers's affidavit set forth, Itkin explained why he had not reported some of his activities concerning local corruption to the FBI. Itkin had also admitted in his testimony that in addition to obtaining information for the government he was en-

gaging in these activities to make money and did not turn over the illegal monies to the FBI.

On February, 7, 1969, Assistant District Attorney Leonard Newman submitted to Judge Cooper a copy of the indictment in the *Corallo* case naming Itkin as a defendant in the corrupt scheme to obtain an emergency contract from Marcus's department to clean the Jerome Park Reservoir.

Mr. Newman also submitted an affidavit pointing out that in that case, Itkin testified that although he was a participant in illegal conduct and was making money, he planned to turn over the information to the FBI at a later date (199-201). He was an actual participant in the Jerome Park matter and was not authorized by the FBI to act in that matter (201-2). Mr. Newman also stated that in summation in the *Corallo* case, Assistant United States Attorney Michael Fawer stated that Itkin was in "for the money alone," that although he had been providing information to the FBI for a five-year period concerning the activities of members of organized crime, he was not telling them about his other illegal money-making activities. He did not tell them about his involvment in "these local corruption situations until late 1967" and as with the other illegal activities, he did not tell them until after the time had passed and the money had been distributed. His motives were "base" and "he wanted to make money" (203-4).

Itkin's role in the scheme to bribe Marcus was characterized by the government in the Court of Appeals as that of a co-conspirator, not a federal informant:

"* * * the record in this case shows that Itkin, though an FBI informant for years, kept that agency in the dark as to the existence of the Jerome Park Reservoir scheme and his role in it until the latter part of July 1967 (see generally Tr. 1377-94). Further, Itkin's participation in the conspiracy was hardly motivated in its entirety by a desire to bring the defendants to book: in his own words Itkin kept his portion of the bribe money 'to pay off [creditors] * * * that were, I felt, entitled to get repaid. So I guess in my heart, too, that I was making money' (Tr. 1383). * * *" *United States* v. *Corallo*, 413 F. 2d 1306 (2d Cir. 1969), Brief for United States, p. 43.*

On July 8, 1969, the Court of Appeals, having reviewed the trial record in that case, found:

"*Itkin's Participation in This Conspiracy Was Wholly on His Own. The Record Does Not Sustain Appellants' Claim that Itkin Participated as a Government Agent Pretending to Be a Conspirator.* * * *.

"On this subject Itkin's testimony is explicit and clear:

> The Court: Were you engaged in this on your own, the Jerome Park Reservoir? That was your own activity, was it not?
>
> The Witness: Yes, sir.
>
> The Court: You were acting on your own there as a participant?
>
> The Witness: Yes, I was.

"Q. You were doing this in order to turn the information over to the Government, is that correct? A. No.

"Itkin never deviated from this position.

"It is interesting to observe how the individual participants in the conspiracy endeavored, each in his

* Quoted in petitioner's affidavit and memorandum of law on application for mandamus, pp. 8-9.

own particular fashion, to gain some advantage from Itkin's contact with the FBI, whatever it may have been. Itkin used it as a sort of anchor to windward throughout. Doubtless it helped him persuade the prosecutor to consent to a severance as to him. He claims he revealed all to the FBI in July, 1967, after the last payment had been received from Fried and the conspiracy was in effect over. In any event he pocketed the money, and it is something of a coincidence * * * that Itkin should have waited until the state Grand Jury had begun its investigation, and the District Attorney of New York County was hot on his heels, to decide to tell all to the FBI.

* * *

"Corallo and the other appellant use Itkin's reference to the FBI in a variety of ways. Their principal contention is that Itkin was not a conspirator at all but only a Government Agent pretending to be a conspirator. From this premise, apparently urged as matter of law, it is argued that it was error to describe Itkin as an accomplice and that it was error not to strike from the record Itkin's testimony of the hearsay declarations of Marcus and appellants as co-conspirators. As appellants did not choose to call anyone from the FBI as a witness, there is no testimony to support appellant's assertion that from first to last Itkin was working with the FBI and under the directions of the FBI in order to help appellants to commit the crime charged in the indictment. The testimony of Itkin on the point, as quoted above, is that whatever else he might have been doing with the FBI to uncover the machinations of the underworld, he was in this venture entirely on his own and acting wholly without the knowledge of the FBI until he found it to his interest to tell the FBI, after the last installment of the bribe had been paid.

"• • • We find no concessions by the prosecutor that support the basic contention that Itkin functioned not as a conspirator but as a Government *Agent Provocateur.* • • •" *United States* v. *Corallo*, 413 F.2d 1306, 1330-1321 (2d Cir. 1969), *cert. denied*, 396 U.S. 958, 963 (1969).

In its memorandum in opposition to certiorari in the *Corallo* case, the United States took this position:

"Petitioner asserts that Itkin, who had agreed to provide information about organized crime activities to the F.B.I., did not participate in the instant conspiracy as an actual member thereof but rather in his capacity as an informant. But the factual issue whether Itkin was acting for himself or for the government in the present case was resolved against petitioner by the trial judge and by the court below on appeal • • •.

"The record—which shows, *inter alia*, that Itkin never reported anything about the conspiracy to the F.B.I. until after the last payment had been received and the matter was under investigation by the State—fully supports the conclusion that Itkin was not acting as an agent in regard to the criminal conspiracy in this case (Tr. 994-998, 1377-1389).[2]"

"2. In quoting from the government's brief in the court of appeals that Itkin had been 'an F.B.I. informant for years' (Pet. 8), petitioner fails to quote the full context in which this statement appears. That context plainly indicates that the government's position below was that Itkin had a personal stake in the illegal venture charged in this case (see government's brief in the court of appeals, p. 43)." Mem. of United States in Opp., No. 578, Oct. Term, 1969, filed Oct. 10, 1969, at 2.

In its memoranda in opposition to certiorari in the cases of co-defendants Fried and Motto, the government, in responding to their claims that Itkin was a government

informer and not a co-conspirator, stated that it relied on the opinion of the Court of Appeals. See Mem. of United States in Nos. 620 and 749, Oct. Term, 1969, filed Oct. 22 and Nov. 4, 1969, at 2.

This Court denied certiorari in all three cases. 396 U.S. 958, 963 (1969).

Assistant District Attorney Newman also submitted to Judge Cooper an affidavit (136-54) accompanied by a copy of the indictment in *United States* v. *Carmine G. DeSapio, Antonio Corallo, and Henry Fried* (68 Crim. 1012). This prosecution involved the use of interstate facilities to promote bribery against the laws of New York, by obtaining from Marcus's Department of Water Supply, Gas and Electricity a permit allowing Consolidated Edison Company of New York to rebuild an electrical transmission line. In this indictment, Itkin was named as a co-conspirator in the criminal plot.

In this prosecution and the previously discussed *Corallo* case, Itkin was established as a participant in criminal conspiracies to use interstate facilities to violate the New York laws against bribery, from January 1, 1966 to December 18, 1967, (Jerome Park Reservoir scheme) and from January 1, 1967 to December 20, 1968 (Consolidated Edison scheme), an overall period which completely included the period covered by two of the state indictments (140-9, 150-4). However, Itkin had claimed in his affidavit to Judge Cooper that during the period covered by two of the state indictments he had been an informant for the United States government. Mr. Newman stated that he

brought the United States indictments to the court's attention because they directly bore on Itkin's contention that he committed the acts covered by the state indictment under color of authority of the United States Government.

Subsequently, Mr. Newman submitted to the court portions (190-204) of the trial testimony of FBI agent William A. Vericker in the recently concluded *DeSapio* trial (68 Crim. 1012), which indicated that Itkin was not authorized by the FBI to commit the criminal acts specified in the state indictments. Mr. Vericker testified that although it was not FBI policy to permit its informants to retain proceeds of the crime, Itkin had usually disbursed the proceeds and reported to the FBI after the deals had been completed (191). Itkin was always acting on his own as a voluntary informant, a citizen, and the FBI treated him as such (192). The FBI told Itkin it could not condone illegal activity on his part (193), but they knew that he had obtained illegal money (194).

Mr. Newman provided Judge Cooper with the trial testimony of Itkin in the *DeSapio* case. Itkin said it was his own idea to keep the money from illegal deals and that he chose his deals on his own, not at the direction of the FBI (195-6).

The District Court was also informed that in summation in the *DeSapio* case, Assistant United States Attorney Paul Rooney had stated that Itkin had done "worse than bad things," that he was not an FBI agent and that the FBI did not know of his activities until the deals were completed (202).

In the *DeSapio* appeal to the Court of Appeals, the United States said in its brief that Herbert Itkin was a member of the Consolidated Edison bribery conspiracy (government's brief in *United States* v. *De Sapio*, p. 81). Stated the government:

> "The FBI's role was purely passive. They did not assist Itkin in any way nor did they direct him to investigate anything in particular. They simply listened to what he had to say. From time to time Itkin would report that he himself had committed a crime, but usually after the fact. Although FBI agents obviously do not keep money that comes into their possession during the course of an investigation, Itkin did keep whatever money he succeeded in obtaining illegally. Itkin was cautioned 'quite clearly' that the FBI could not 'condone' his criminal activities or insulate him from prosecution; but the FBI did not arrest him or stop listening to his reports because he was supplying a 'tremendous' amount of information on major criminals (Tr. 1792-9, 1812, 1859-60, 1862-6, 1873-4, 1876)" (*id.* at 84).

The government urged that

> "Itkin was fully as guilty as DeSapio of the crimes charged in this case. He knowingly participated with intent to profit" (*id.* at 85).*

The appeal in *DeSapio* has been argued, and decision has been reserved.

Mr. Newman also set forth before Judge Cooper that in the trial of the *United States* v. *Berger et al.*, 68 Crim. 631, a prosecution for giving illegal kickbacks for loans from Teamsters pension funds and other union funds,

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* Quoted in petitioner's reply on application for mandamus, p. 3.

Itkin testified that he constantly stole money (196) and that the government sometimes knew about it, at least after it occurred (197). The FBI had told Itkin that it could not condone his crimes or give him authority to commit crime (197-8). Itkin concealed things from FBI agent Vericker and lied to him on many occasions (198). Itkin was named as a co-conspirator in all counts of the government's bills of particular in the *Berger* case, which is presently on appeal to the Court of Appeals. In that Court, the Government has characterized Itkin as a culpable party to the conspiracies charged in the *Berger* case and has refuted the arguments that Itkin was not a co-conspirator because he reported to the FBI on many matters from 1963 to 1968, gave the FBI some current information on a corporation involved in the *Berger* case, and stated that his avowed motive was to "infiltrate" for the ultimate benefit of the government:

> "However, there was not a shred of evidence that Itkin was feigning an agreement to commit a crime, with no intent to carry it out * * *
>
> "Moreover, Itkin also testified without contradiction that he lied consistently to the FBI to conceal his own illegal involvement in the Cashmere deals * * *, that he kept whatever money he made for himself * * *, and that
>
> > 'the FBI made it clear to me that because of the rules and regulations that they had they could not condone my doing anything which they would consider illegal and therefore they made it clear to me that I was on my own. * * *' * * *
>
> Thus the proof of Itkin's criminal responsibility for his acts and statements was both direct and uncontradicted. * * *

> "* . . . A claim as to Itkin's co-conspirator status identical to that made by [appellant] here has been rejected by this Court in *United States* v. *Corallo*, 413 F.2d 1306, 1320 (2d Cir. 1969). There the point was even simpler for the government, since Itkin testified not only that his participation in that conspiracy was not authorized by the F.B.I., but also that his conduct was not even benignly motivated." *United States* v. *Berger*, brief for United States, pp. 26-7.

The government also quoted (pp. 37-8, footnote) the Court of Appeals' opinion in the *Corallo* case [413 F.2d at 1322, n. 2] wherein that "Court quoted with approval" Judge Weinfeld's ruling, "equally applicable to the facts" in *Berger*, in refusing to charge on the question of entrapment by Itkin:

> " 'The fact of the matter is that the evidence is clear beyond any question in the Court's view that this was an independent venture of his own, that he participated on his own, it was not initiated by the Government in any respect, and that it was after the entire transaction was over that he informed the Government as to the nature of the transaction.' "

The government concluded in its brief in *Berger* that "the proof was uncontradicted that Itkin participated in the Local 10 conspiracy on his own, without the knowledge and against express instructions of the FBI. Thus, whatever Itkin's conduct, as a matter of law the government was not chargeable with it. *United States* v. *Corallo*, 413 F.2d 1306, 1320-23 (2d Cir. 1969)." Brief for United States, p. 37.*

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* Quoted in petitioner's affidavit and memorandum of law on application for mandamus, pp. 17-19.

William Vericker, a Special Agent of the FBI submitted an affidavit to Judge Cooper (92-3) stating that Itkin had been a confidential informant for the FBI during the period covered by the three state indictments and had furnished information concerning the subject matter of the indictments. The affidavit did not say when this information was transmitted or what it was, and did not say that Itkin was authorized to commit the acts alleged in the state indictments. Other information that Itkin furnished resulted in the filing of seven indictments in the Southern District of New York and several related matters were under investigation.

Lawrence R. Houston, General Counsel of the CIA submitted an affidavit (94-5), stating that Itkin furnished information to the CIA which was classified. The identity of the intermediary was classified and Itkin had been instructed to disclose neither the information nor the intermediary. According to John K. Greaney, Assistant Counsel to the CIA, Judge Cooper had requested this affidavit (135).

The United States Attorney of the Southern District of New York, by Stephen E. Kaufman, an Assistant United States Attorney, submitted an affidavit in response to a request by Judge Cooper for participation by the government (96-8), merely referring to and summarizing the other affidavits, and stating the "Government's opposition" to the People's motion to remand. He also argued orally in support of Itkin (106-16).

Assistant District Attorneys Leonard Newman and Frank Rogers then submitted separate affidavits (125-35)

with respect to Itkin's relationship to the FBI and the CIA. Rogers stated that representatives of the Bureau, whom he named, had informed him that Itkin did not report any "local matters" to the FBI until August, 1967, that they were unaware of certain of his activities for a long period and that when they became aware of them, they instructed him to discontinue these activities, an instruction Itkin disregarded. At a later meeting, members of the FBI admitted that they were unaware of his activities with James L. Marcus until late July, 1967. They further stated that they were unaware of his activities with respect to the second and third New York indictments—alleging conspiracy to commit perjury, and bribery and conspiracy to commit bribery—until after December 18, 1967 (three days after the last date specified in the indictments), and that they had not authorized or approved any of his acts in the second and third indictments.

Assistant District Attorney Leonard Newman stated that he had spoken with John K. Greaney, Assistant Counsel of the CIA, who had told Newman under the CIA's authority that the CIA had never employed Itkin, that it had never authorized, directed or instructed him to do anything on its behalf and that whatever information Itkin furnished to the CIA was on a voluntary basis and bore no relationship to any of the acts covered in the three indictments. Although Greaney was willing to submit an affidavit on his own, he was not permitted by the Agency to do so unless ordered to by Judge Cooper, the initiator of the first CIA affidavit (135).

The CIA filed no more documents. The FBI did not respond at this time.

The Rogers and Newman affidavits reporting acknowledgment by officials of the FBI and CIA as to Itkin's lack of authority to engage in the acts encompassed by the three state indictments still produced no contradiction or other response. However, more than a year later, the People's motion for remand still being undetermined by Judge Cooper, a response was suddenly filed.

On April 22, 1970, FBI Agent Warren Donovan submitted an affidavit (155-8) stating that Itkin was encouraged to supply information to the FBI about Teamster loans. Itkin had given them general information including facts concerning the state perjury and bribery indictments. Donovan did not say when this information had been received.

In response, Assistant District Attorney Frank Rogers filed an affidavit (183-9) dated May 15, 1970, stating, among other things, that in the federal trials in which Itkin was a witness, FBI agents testified that the FBI did not authorize its informants to commit state crimes. Rogers submitted that the FBI did not have the power to authorize its informants to commit state crimes. In addition, Mr. Newman gave the court portions of the trial testimony of FBI agent Vericker and Herbert Itkin and portions of the summation of the government prosecutors in the *Corallo, De Sapio* and *Berger* trials.

On July 7, 1970, Judge Cooper decided the People's motion to remand. He denied the motion.

On August 28, 1970, the petitioner petitioned the United States Court of Appeals for the Second Circuit to issue a writ of mandamus directing Judge Cooper to remand the New York State prosecutions against Herbert Itkin from the United States District Court to the New York Supreme Court, New York County, under Section 1447(c) of Title 28 of the United States Code. The petition was sealed by order of the Court of Appeals, dated September 3, 1970, and an answer was ordered filed by the respondent by September 17, 1970. Both the Government and Herbert Itkin, through counsel, filed briefs. On September 24, 1970, the Court of Appeals denied the petition without oral argument and without opinion.

Reason for Granting the Writ

The orders below conflict with the decisions of this Court as to the proper application of 28 U.S.C. 1442 (a) (1), governing removal of actions against federal officers.

a. The Federal District Court exceeded its jurisdiction in refusing to remand the state prosecutions to the state court.

Herbert Itkin removed the three indictments under the authority of 28 U.S.C. 1442(a)(1), which provides:

> "1442. FEDERAL OFFICERS SUED OR PROSECUTED
>
> "(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending.
>
> "(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue."

Itkin's assertion that his crimes specified in the three state indictments were committed under color of federal office was astounding. For example, it was unbelievable that a swindle of $15,000 dollars from a New York citizen to finance Itkin's personal enterprises could have occurred under color of federal office (Indictment No. 1589-67). Also incredible was the assertion that Herbert Itkin was acting under color of federal authority when he conspired to undermine the integrity of a vital organ of state justice by

inducing New York City Commissioner James L. Marcus to testify falsely before a New York grand jury that was duly investigating bribery and other serious crimes (Indictment No. 2842-68). That Itkin was authorized by the federal government to corrupt a high New York City official by having him bribed to award City contracts and that Itkin himself was authorized to retain part of the kickback —the crimes alleged in the third indictment—defied the imagination (Indictment No. 2843-68). Indeed, in *United States* v. *Corallo, Fried, Itkin, Marcus, Motto, et al.*, Itkin was named by the government as a co-defendant in a scheme to use interstate facilities to bribe Marcus in violation of New York law, for the same type of contract. Moreover, his conspiring to suborn Marcus's perjured testimony in the state grand jury, alleged in the second state indictment, was designed to conceal the corrupt scheme that was charged in the *Corallo* case, which the local grand jury had been investigating. Since Itkin had, by his own admission at the *Corallo* trial, concealed this bribery scheme from the federal authorities, and since his procuring of Marcus's perjury was designed to suppress that corruption from the local grand jury, it was inconceiveable that the acts alleged in the state perjury and bribery indictments were committed under color of federal office. Yet, a federal District Court has upheld Itkin's remarkable theories as to the perversion of federal office.

The interpretation of the removal statute by this Court in three landmark cases entitled *Maryland* v. *Soper*, 270 U.S. 9, 36, and 44 (1926) establishes the strict standard by which these bizarre facts are to be judged, and demonstrates that the state prosecutions against Itkin should have

been remanded to the state courts. There, this Court, in a mandamus proceeding against a federal district judge, ordered remanded to the state courts prosecutions against five federal officers who had been indicted for murder, conspiracy to obstruct justice by giving false testimony at a coroner's inquest, and perjury. There, as here, the defendants were charged with conspiring to deceive an investigating state jury by giving false testimony concerning the commission of a state crime. After the district court denied a motion to remand, this Court issued a writ of mandamus, holding the removal improper, since the petition for removal had not expressly shown that the defendants' entire relation to the crime was confined to their official acts. In an opinion by Mr. Chief Justice Taft, this Court held that a prosecution of federal agents could not be removed unless the prosecution was

> "* * * instituted 'on account of' acts done by the defendant as a federal officer under the color of his office or of the revenue or prohibition law. There must be a causal connection between what the officer has done under asserted official authority and the state prosecution. It must appear that the prosecution of him, for whatever offense, has arisen out of the acts done by him under color of federal authority and in enforcement of federal law, and he must *by direct averment exclude the possibility that it was based on acts or conduct of his not justified by his federal duty*" (emphasis added). *Id.* at 33; see *Brenner* v. *Kelly*, 201 F. Supp. 871, 873 (D. Minn. 1962).

In the case at bar, the government asserted in the Court of Appeals that "whenever" a "state criminal" desires to test his claim that he acted under federal authority, he

is entitled to a trial to test that issue in a federal court (government's brief, at 14). Not only is this a misstatement of the law, but it invites an infinite number of state defendants to seek a trial in federal court. For this proposition, the government cited *Willingham* v. *Morgan*, 395 U.S. 402 (1969), a civil removal case, and stated that this case had overruled *Maryland* v. *Soper, supra*, criminal removal cases. In fact, *Willingham* cites *Soper* with approval and states that in criminal removal cases "a more detailed showing might be necessary because of the more compelling state interest in conducting criminal trials in the state courts" (*id.* at 409, n.4). And *Willingham* does not stand for the proposition that every state civil defendant claiming to have acted under federal authority is thereby entitled to have his case litigated in federal court. He must also show that his relationship to the civil transaction "derived solely from (his) official duties." *Id.* at 409. Itkin's brief as well failed to account for these distinctions.

The burden of proof in the District Court was on Herbert Itkin, since he was the initiating party seeking removal. *Smith* v. *City of Jackson*, 358 F.2d 705 (5th Cir. 1966); *Colorado* v. *Symes*, 286 U.S. 510, 520 (1932); see *Jackson* v. *City of Vicksburg*, 361 F.2d 473 (5th Cir. 1966); *Kalso* v. *City of Meridian*, 360 F.2d 282 (5th Cir. 1966). This is particularly important in criminal cases because of the "more compelling state interest in conducting criminal trials in the state courts." *Willingham* v. *Morgan*, 395 U.S. 402, 409, n. 4 (1969). But Itkin's disclosures fell short even of those held by this Court to be vague and incomplete. His attorney's affidavit stated that the indictments allege certain facts that occurred during periods when the defendant

was an "informer" for the FBI. No relationship between what the defendant did under the indictments and what he did for the FBI was established. Itkin, in his own affidavit, referred to the indictments individually, but did not state that the venal acts alleged in the indictments were done for the FBI or the CIA. All he stated was that during the periods set forth in the three indictments, he "was acting pursuant to instructions from each Agency" (84) and that he kept the FBI informed of some of his activities during those periods (85, 87, 89). In short, Itkin made the conclusional and unsupported statement that all the acts charged in the indictments were performed as part of his duties for the FBI as an informer. He did not meet the burden placed upon him by the statute; he did not give the exact, detailed statement for removal which this Court set up as a standard in *Maryland* v. *Soper, supra.*

The government claimed in the Court of Appeals that the record was too "sparse" now for a decision on the merits (brief, at 15). The sparseness, however, is due wholly to Itkin's and the government's dismal lack of factual averments as to the connection between the alleged state crimes and his duties as an informant, and it is for this reason that this Court has required direct, specific allegations of color of authority, their absence resulting in a remand to the state court prior to any trial, the proper result here. *Maryland* v. *Soper, supra; Colorado* v. *Symes,* 286 U.S. 510 (1932).

Although an FBI and a CIA official filed affidavits stating that Itkin had furnished information to their agencies

at unspecified times, they did not show that he had been authorized by them to gather this information or to violate state law in the process. Rather, as the Court of Appeals declared in *United States* v. *Corallo*, 413 F. 2d 1306 (2d Cir. 1969) *cert. denied* 396 U.S. 958, 963 (1969), Itkin pocketed the fruits of his crimes and "waited until the state Grand Jury had begun its investigation, and the District Attorney of New York County was hot on his heels, to decide to tell all to the FBI." 413 F.2d at 1321.

And, in fact, the federal prosecutions of Herbert Itkin are so inextricably entwined with the state indictments that it is impossible to say that in his criminal transactions he was a co-conspirator against the federal government, as alleged in the federal indictments, and proved in the District Court, while at the same time he was a federal agent following official instructions when he violated state law in the same transactions. In the Court of Appeals the government could not explain the contradictions in its oscillating treatment of Itkin. In the *Corallo* case, for instance, Itkin, a named defendant, arranged with Motto and Corallo to help Marcus cover his stock losses by providing him with cash in return for a public contract to Fried's company, some of the cash being credited to Marcus's account with Koenig & Co. When the District Attorney of New York County summoned Marcus to testify before the state grand jury as to the source of his deposits with the Keonig Company, Itkin, the second state indictment charges, induced Marcus to testify falsely that the source of the deposits was his father. Marcus falsely testified before the state grand jury that he did not know Corallo. In *Corallo*, defendants were convicted of using a facility in interstate commerce

with intent to promote bribery in violation of New York State laws, the same laws involved in the third state indictment. That indictment charged that Itkin had conspired with Marcus and others that Marcus, as a public officer, would award emergency contracts from the City to certain companies for kickbacks. The bribes were actually received. One of the companies was Edward Orlando's, in which Fried, a defendant in the *Corallo* case, was a silent partner. See *United States* v. *Corallo, supra* at 1317. In its indictment, summation to the jury and brief on appeal, in *United States* v. *Corallo, supra*, the government characterized him as a co-conspirator making money on his own, not as an informant; its position was adopted by the Circuit Court. Itkin himself testified that he was not authorized by the FBI to act in the Jerome Park matter, a matter intertwined with the second and third indictments, in which the government now claims Itkin was cloaked with federal authority. This was also true in *United States* v. *Berger*. The case of *United States* v. *Carmine G. De Sapio, Antonio Corallo and Henry Fried*, naming Itkin as a co-conspirator, also involved the use of interstate facilities to promote the bribery of Marcus, a public officer, against state law.

Despite this striking inconsistency, the government and Itkin chose not to mention it below, let alone explain it. We submit that it is inexplicable, that the government cannot dress Itkin in two different masks before the federal courts, but is compelled honestly to describe him as they have in their prosecutions, as a criminal conspirator working on his own to violate state laws.

The government conceded in the Court of Appeals that the petition seeking removal must be "specific" (brief, at 16), but Itkin's petition and the supporting papers plainly were not. Contrary to the government's assertion, Itkin never explained the alleged relationship between what he did for the government and the state crimes he committed. Respecting the first state indictment, he did not show how his stealing of escrow funds and keeping them was part of his federal duty in investigating the obtaining of loans from teamster funds.

Concerning the second state indictment, the government contended that Itkin was authorized to conspire with Marcus to commit perjury before the state grand jury because, after the whistle had been blown, Itkin informed the District Attorney's Office in advance of the perjury. This alleged communication of the prospective perjury after the alleged conspiracy had no bearing on whether Itkin had been authorized to conspire before then to have Marcus commit perjury. Moreover, contrary to the government's claim, the petitioner denied by affidavit that Itkin had ever made that communication (appendix, at 188). Also, contrary to the government's surprising statement in the Court of Appeals (brief, at 18), the petitioner did and does contest the sufficiency of Itkin's showing with respect to this indictment (see petitioner's aff. and mem., at 11, 21, 24-5).

The government stated to the Court of Appeals that it was "at least arguable" that Itkin was authorized to commit the acts of bribery in the third state indictment (brief, at 18-19), but gave no basis for this conclusion other than its oft-repeated claim that Itkin disclosed his activities to

the FBI. However, after-the-fact disclosure could not constitute authorization, especially when, as pointed out by the Court of Appeals, the disclosure resulted only after "the District Attorney of New York County was hot on his heels." *United States* v. *Corallo,* 413 F. 2d 1306, 1321 (2d Cir. 1969), *cert. denied,* 396 U. S. 958, 963 (1969).

The government also conjectured in the Court of Appeals that "if" the secrecy of information pertaining to the CIA or other federal agencies were involved, a federal court and not a state court should deal with the case (brief, at 19). Itkin never raised this as a ground for removal and it is wholly speculative. Nor is it a ground for removal set forth by Congress.

In *Colorado* v *Symes,* 286 U. S. 510 (1932), a federal prohibition agent, who was charged by the state with murder by intentionally striking the victim on the head with a gun, showed by his removal petition that in performance of his official duties, it became necessary for the agent to strike the deceased on the head with the agent's gun in order to subdue him. This Court held that this was too vague, uncertain and incomplete a disclosure and granted the remand. Itkin's allegations fall far short of these. See also *Willingham* v. *Morgan, supra* at 409, n.4. An informant for a federal agency cannot receive a license to violate state law, the suggestion in FBI Agent Donovan's vague affidavit to the contrary, notwithstanding. See *Fink* v. *Gerrish,* 149 F.Supp. 915, 917 (S.D.N.Y. 1967); *Nass* v. *Mitchell,* 233 F. Supp. 414, 417 (D. Md. 1964); *Brenner* v. *Kelly,* 201 F. Supp. 871, 874 (D. Minn. 1962). And surely

the reporting of crimes after they occur is not sufficient to render those acts, retroactively, acts committed under color of federal office. In any event, Mr. Donovan's affidavit is uninformative as to the contents and dates of the reports to the FBI; like the other materials submitted for Itkin, it failed to meet the burden of showing factually and directly that the criminal acts specified in the three indictments were committed under color of federal office. As for the CIA, even Ian Fleming lacked the ingenuity to have contrived a connection between that Agency's functions and the commission of thievery, perjury and bribery by Herbert Itkin; indeed, neither Itkin nor the CIA has seriously attempted to set forth such a connection.

In sum, the record shows that the irrepressibly perverse Itkin, whatever his relationship with the FBI, violated state laws purely for his own benefit, but now, armed with inside knowledge of the denizens of his world of corruption, has become a star witness in the District Court to the federal crimes of his accomplices, and has succeeded in enlisting the intervention of federal authorities in the state prosecutions. However, his criminal intent being so clear, they have been obliged to charge him as a defendant or co-conspirator in the District Court. Similarly, the State of New York is entitled to charge him as a defendant in the Supreme Court of New York County.

The People stand ready to try Itkin promptly (42-4, 46, 126-31), in the proper forum. However, in denying the People's motion to remand, the District Court, impressed by Itkin's present role as a Government witness, miscon-

strued the issue before it, and frankly revealed that removal has been used to delay his trial on serious state charges:

> "What really is involved here is a matter of time sequence: the District Attorney believes his duty requires him to proceed against Itkin now; the Government, equally motivated, sees such a move as dangerously interfering with its own prosecutorial obligation to further criminal proceedings which will collapse without Itkin's present cooperation and subsequent testimony" (209).

The removal statute does not make "time sequence" a relevant consideration in reviewing a motion to remand to the state court.

Similarly, major portions of the opinion (210-11) are devoted to a list of past and future prosecutions to which Itkin's testimony is essential. From this the District Court concludes (212):

> "Regardless of this Court's estimation of the propriety of Itkin's personal conduct, we cannot deny the extraordinary usefulness he has already exhibited, and of equal importance, may continue to provide to the Government in exposing underworld activities. Whatever lack of morality attributable to the informer—all of which must be fully related and dealt with at the proper time and place—the fact remains: his indispensability to successful prosecution."

Regardless whether Itkin's testimony is indispensable to the success of future federal prosecutions, the success or failure of governmental prosecutions is not the standard set out by 28 U.S.C. 1442(a)(1). The question was not whether Itkin is a valuable witness to crimes in which he

participated—many accomplices and co-conspirators are —but whether his violations of state law were committed under color of federal office, and whether he met his burden of showing by specific factual averments that they were; clearly, he did not.

At the close of the opinion, Judge Cooper seems at least to have given recognition to the existence of the removal standard: "It is *conceivable* that each of the activities alleged in the three State indictments could have been, as Itkin asserts, part of his functioning as an undercover informant" (222) (emphasis added). But this feeble standard of conceivability conflicts directly with the standard established by this Court that the defendant "must by direct averment exclude the possibility that (the offense) was based on acts or conduct of his not justified by his federal duty." *Maryland* v. *Soper, supra* at 33.

b. Mandamus is the proper remedy for the District Court's error.

Since the order denying remand of the three State prosecutions against Itkin to the Courts of the State of New York was erroneous, the People were entitled to a remand by a writ of mandamus, the only method by which to order the District Court to comply with the law. *Maryland* v. *Soper, supra,* 270 U.S. 9, 30, 36, 44 (1926); *Colorado* v. *Symes, supra,* 286 U.S. 510, 520 (1932). See *United States* v. *Dooling,* 406 F.2d 192, 198-9 (2d Cir. 1969), *cert. denied,* 395 U.S. 911 (1969). The District Court has "wrested" from New York County the right "to try offenses against its own laws and in violation of its own peace and dignity * * *" *Maryland* v. *Soper, supra* at 29. Judge Cooper, in

refusing to remand these cases upon a proper application by the People, has transcended the jurisdiction of the court and has undertaken the exercise of powers not vested in him or his court by any law of the United States. It is with astonishment that we view the decision below, since the weak and unreliable statements of Herbert Itkin so dismally failed to sustain his burden of proof. Accordingly petitioner sought mandamus in the Court of Appeals. That Court agreed that mandamus was the proper remedy since it ordered an answer to be filed and denied, rather than dismissed the petition.

In 28 U.S.C. 1651, Congress has provided for the review of orders, where, as here, an inferior court has exceeded its jurisdiction.*

If Itkin were tried in the federal court—after considerable delay (see pp. 29-30, *supra*)—there would be no way for the removal issue to be reviewed, no remedy to the People to correct the usurpation of jurisdiction. Only through a writ of mandamus may New York State receive its remedy for this unlawful assertion of jurisdiction by a federal District Court. See *Federal Court Review by Extraordinary Writ: A Clogged Safety Valve in the Final Judgment Rule*, 63 Yale L.J. 105, 108-9 (1953); *The Writ of Mandamus: A Possible Answer to the Final Judgment Rule*, 50 Colum. L. Rev. 1102, 1108 (1950).

"There is some need for flexibility so that, in exceptional situations, appellate review may be had of

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* 28 U.S.C. 1651

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

an order that is non-appealable under either the statutes governing interlocutory appeals or those governing appeals from final judgments. We believe that Congress so provided in the All Writs Statute, which goes back to the first Judiciary Law of 1789." 6 *Moore, Federal Practice* 54.10 [1], at 59.

The landmark cases of *Maryland* v. *Soper*, 270 U.S. 9, 36, 44 (1926) and *Colorado* v. *Symes*, 286 U.S. 510 (1932), where state criminal cases had been improperly removed, establish mandamus as the appropriate remedy. Use of mandamus in such cases has been reaffirmed by this Court in *Will* v. *United States*, 389 U.S. 90, 95 (1967):

> "The peremptory writ of mandamus has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943). While the courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction,' it is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy. • • • Thus the writ has been invoked • • • *where it was the only means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations, State of Maryland* v. *Soper*, 270 U.S. 9 (1926)" (emphasis added). See also 46 Harv. L. Rev. 91, 106 (1932).

As Professor Moore has written [6, *Federal Practice*, 54.10(2), at 69]:

> "• • • [W]here state criminal prosecutions are removed by the defendant into the federal district court, *a denial of the state's motion to remand may be re-*

viewed, at its instance, by an appropriate writ, because of its interest in conducting the trial in its courts and because of the inadequacy of the remedy of appeal" (emphasis added).

Clearly, the Court of Appeals is vested with the jurisdiction to compel the remand of these prosecutions to the State court and correct the unlawful and arbitrary action of the District Court, and erred in refusing to do so.

Conclusion

A writ of certiorari should issue and the order of the Second Circuit should be reversed.

Respectively submitted,

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October 5, 1970

APPENDIX

Order Below Requiring Answer and Sealing Petition

Docket No. 35322

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

against

Honorable IRVING BEN COOPER, United States District Judge for the Southern District of New York,
Respondent.

A petition for a writ of mandamus having been filed,

Upon consideration thereof, it is ordered that:

1. An answer to said petition shall be filed by respondent on or before September 17, 1970.

2. As suggested in the order submitted by petitioner, in view of the order of the Honorable Irving Ben Cooper, District Judge, dated October 24, 1968, forbidding the District Attorney of New York from divulging the contents of the affidavit of Herbert Itkin, dated October 23, 1968, and filed in the District Court in 68 Civ. 3931, to anyone except those involved in the prosecution of three state indictments against Herbert Itkin, the four copies of the petition for a writ of mandamus and accompanying papers filed with this court by petitioner be sealed, until further order of this court.

J. Edward Lumbard
Robert P. Anderson
Wilfred Feinberg

Order Below Denying Petition

Docket No. 35322

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

against

Honorable IRVING BEN COOPER, United States District Judge for the Southern District of New York,
Respondent.

A petition for a writ of mandamus having been filed, the United States Attorney having filed an answer thereto on behalf of the respondent, and the petitioner having replied thereto,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. Edward Lumbard
Robert P. Anderson
Wilfred Feinberg
U.S.C.J.J.

September 24, 1970